

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:
of	:
INTERNATIONAL INSTALLATIONS, INC.	: DETERMINATION ON REMAND
for Redetermination of a Deficiency or for	:
Refund of Corporation Franchise Tax under	: DTA NO. 812307
Article 9-A of the Tax Law for the Year 1991.	:

Petitioner, International Installations, Inc., 200 Madison Avenue, New York, New York 10016, filed a petition for redetermination of a deficiency or for refund of corporation franchise tax under Article 9-A of the Tax Law for the year 1991.

An initial determination was issued by Administrative Law Judge Winifred M. Maloney on March 10, 1994. On exception, the Tax Appeals Tribunal affirmed in part the order of the Administrative Law Judge and remanded the case to the Administrative Law Judge for a new hearing on "whether the notice was properly issued and, if not, the effect of the error."¹ The Tribunal also directed the Administrative Law Judge "to reconsider her decision with respect to the mailing of the notice 'at issue in this proceeding'." On October 26, 1994 and November 2, 1994, respectively, petitioner appearing by Alexander J. D. Greeley, Esq., and the Division of Taxation

¹In its decision, the Tribunal stated that if the parties agreed to proceed without a hearing, then a hearing need not be held.

appearing by William F. Collins, Esq. (Christina L. Seifert, Esq., of counsel), consented to have the controversy determined on

submission without hearing, with all briefs and documents to be submitted by March 22, 1995, which date commenced the running of the six-month period for the issuance of this determination on remand. The Division of Taxation submitted documents on December 14, 1994. On January 27, 1995, petitioner submitted a Brief (Supplemental).² The Division submitted a letter in lieu of a brief on March 1, 1995. Petitioner submitted, on March 10, 1995, a letter in lieu of a reply brief.

ISSUES

I. Whether the Notice of Deficiency was properly issued to petitioner.

II. Whether the petition for redetermination of a deficiency should be dismissed for failure to file the petition within 90 days of the mailing of the Notice of Deficiency.

FINDINGS OF FACT

Findings of Fact "2" through "14" were found by the Tax Appeals Tribunal in its decision issued September 15, 1994.

Petitioner, International Installations, Inc., is a subsidiary of McNally International Corp. McNally International Corp.'s principal business activity is transportation service.

²Petitioner's representative submitted a document entitled "Brief Supplemental Affirmation" on November 16, 1994.

On August 31, 1993, petitioner filed a petition with the Division of Tax Appeals for redetermination of the deficiency of corporation tax. A review of the petition discloses the following information:

(a) Petitioner is identified as "International Installations, Inc." and "McNally International Corp.";

(b) Petitioner states (by checking appropriate boxes on the petition form) that it is petitioning for redetermination of a deficiency of corporation franchise tax under Article 9-A of the Tax Law. The years listed are 1988, 1989 and 1991;

(c) The Taxpayer Identification Numbers are listed as: 11-2040702-2 and 11-1904070-6;

(d) The notice/assessment numbers are listed as: L-007035132-5; L-003302585-1; L-003116270-6; L-003302587-8; L-003302586-9; and

(e) Petitioner stated that "[t]he amount of tax determined was \$2,777.00 and the amount of tax contested is \$2,777.00.

The petition states that the taxpayer filed a corporation tax return, as did the parent corporation, on Form CT-183; and that the Commissioner made assessments as minimum tax, "after tax audit" as follows:

<u>Year</u>	<u>Assessment</u>	<u>Tax</u>	<u>Penalty</u>	<u>Interest</u>	<u>Total</u>
(1) 1988	L-003302585	\$ 175.00	\$ 43.59	\$ 97.20	\$ 315.79
(2) 1989	L-003302586	725.00	165.49	285.18	1,175.67
(3) 1990	L-003302587	920.00	154.22	223.49	1,297.71
(4) 1991	L-007035132	<u>957.00</u>	83.19	70.71	<u>1,010.90</u>

\$2,777.00

\$3,800.07

Petitioner asserts that it filed the correct form and paid the correct tax under CT-183 for the above years; and that the corporate return of the parent (McNally International Corp.) clearly states that it is a consolidated return whose figures include the figures of its wholly-owned subsidiary "International Installations, Inc." ID# 11-2040702. Petitioner contends that if the Commissioner were to be upheld, it would be paying tax twice on the above years.

Petitioner alleges that the Notice of Deficiency dated April 1, 1993 was not in fact a 90-day letter since the audit was continuing and not completed. Petitioner contends that the assessments to which the petition refers should be reversed since the taxpayer had already paid the tax in the consolidated return of the parent, McNally International Corp., Form 1120 - ID #11-190407-6, "which was filed as part of the tax return with New York State." Petitioner asserts that the Notice of Deficiency for the year 1991, dated April 1, 1993, was the only one served. Furthermore, petitioner alleges that the Notice of Deficiency, for the year 1991, is defective "insofar as it is addressed to International Installations, Inc." rather than the parent corporation, McNally International Corp., which had filed a consolidated return.

Attached to the petition is a letter dated August 20, 1993 from the Division of Taxation ("Division") to petitioner that states, in part:

"This is in reference to your protest of our above New York State Franchise tax assessment for the period

ending December 31, 1991.

"The original 1120 filed with the federal government attached to the CT-183 did not indicate consolidated.

"The original 1120, filed with the federal government, appears to be the proper 1120.

"The assessment is sustained."

By letter dated September 7, 1993, the Division of Tax Appeals advised petitioner as follows:

"Attached hereto you will find the petition which you recently filed on behalf of the above-referenced taxpayer. The petition has been returned because it was deemed to be not in proper form. Specifically, you neglected to submit the documents necessary for us to determine if the Division of Tax Appeals has jurisdiction over this matter.

"The administrative hearing process begins with the filing of a petition within ninety days from the date of issuance of a Notice of Deficiency. Consequently, we require copies of the Notices which your client is petitioning.

"Please resubmit the petition with copies of the Notices referred to in item (5) on page 1 of the petition. If you fail to submit Notices of Deficiency or the petition is found to be untimely as explained above, then the petition will be dismissed pursuant to the Tax Appeals Tribunal's Rules of Practice and Procedure."

On September 22, 1993, petitioner resubmitted the petition, along with a copy of the Notice of Deficiency for tax year 1991, dated April 1, 1993. In the upper right hand corner, this notice bears the number L-007035132-5 and in the upper left corner the number L-007035132-C002-7. None of the other notices of deficiency referenced in the petition were submitted.

By letter dated November 10, 1993, the Division of Tax Appeals advised petitioner as follows:

"You are hereby notified of our intent to dismiss

the petition in the above-referenced matter.

"Pursuant to section 1089(b) of the Tax Law, a petition must be filed within 90 days from the date a Notice of Deficiency is issued.

"The Notice of Deficiency was issued on April 1, 1993 but the petition was not mailed until August 31, 1993, or one hundred fifty-two days later.

"Pursuant to section 3000.5(b)(5) of the Rules of Practice and Procedure of the Tax Appeals Tribunal, the parties shall have thirty days from the date of this Notice to submit written comments."

Copies of this notice were sent to the Division and to Alexander J. D. Greeley, Esq.

On November 19, 1993, the Division of Tax Appeals received from petitioner its written comments, which included an affirmation of Alexander J. D. Greeley, Esq., a copy of the Notice of Deficiency, a copy of the 1991 CT-184, Franchise Tax Return on Gross Earnings, for McNally International Corp., and a copy of the 1991 Form 1120, U.S. Corporation Income Tax Return, for "McNally International Corp. and Subsidiary."

Mr. Greeley's affirmation reiterates the assertions contained in petitioner's petition that in 1991 the corporation, International Installations, Inc., "filed its tax return as a wholly owned subsidiary of McNally International Corp. . . . and paid tax thereon under art. 9-184", and that therefore any Notice of Deficiency should be addressed to "the taxpayer as appears on the return i.e. McNally International Corp." He also states in his affirmation that the correct procedure would have been to audit the 1991 tax return of McNally International Corp. as filed, and that if there were any changes, there would be a credit to the figures reported by the parent since it filed a

consolidated return. Lastly, Mr. Greeley states that the position taken by the auditor subjects the taxpayer to be taxed twice under Article 9-A and Article 9 and is unconstitutional.

On December 7, 1993, the Division of Tax Appeals received the Division's written comments concerning the Notice of Intent to Dismiss. Included therein were affidavits made by Donna Biondo and Daniel LaFar, a copy of the Division's certified mail record for April 1, 1993, and a copy of the Notice of Deficiency dated April 1, 1993.

Donna Biondo is the Head Clerk of the CARTS (Case and Resource Tracking System) Control Unit of the New York State Department of Taxation and Finance, which relates to the Division's computer system for generating, among other documents, notices of deficiency to taxpayers under Article 9-A of the Tax Law. Her affidavit sets forth the normal and routine procedures followed in the CARTS Control Unit in the processing of notices of deficiency prior to shipment to the Division's Mechanical Section for mailing.

In her affidavit, Ms. Biondo stated that she supervises the processing of notices of deficiency prior to shipment to the Division's Mechanical Section for mailing. As part of her duties, she receives a computer printout referred to as a "certified mail record", and the corresponding notices of deficiency generated by CARTS. She indicated that the notices are predated with the anticipated date of mailing and each is assigned a "certified control number", which is recorded on the certified mail record. She further explained that each notice

is placed in an envelope by Division personnel and then delivered into the possession of a U.S. Postal Service representative, who then affixes his or her signature and/or a U.S. Postal Service postmark to a page or pages of the certified mail record. In addition, Ms. Biondo stated that in the regular course of its business, the Division does not request, demand or retain receipts from certified or registered mail.

Attached to Ms. Biondo's affidavit as Exhibit "A" are the 18 pages of the certified mail record containing a list of the notices allegedly issued by the Division on April 1, 1993, which she asserts bears the information relating to petitioner's notice and is a true and accurate copy of such record.³ Page three of the mail record lists certified mail control number P 911 205 902, Notice of Deficiency number L-007035132, addressed to International Installations, Inc. at 200 Madison Avenue, New York, New York 10016-3903.

The certified mail record consists of 18 pages with certified control numbers running consecutively from P 911 205 874 through P 911 206 064 and there are no deletions. Each of the 18 pages has 11 entries with the exception of page 18 which contains 4 entries, for a total of 191. Each page of the certified mail record is date stamped April 1, 1993 by the Albany, New York, Roessleville Branch, of the U.S. Postal Service and page 18 bears the signature of a postal

³Portions of Exhibit "A" have been redacted to protect the privacy of taxpayers who are not a party to this proceeding.

representative beneath the circled number 191. All 18 pages bear the certified mail record print date of March 22, 1993, changed manually on the first page only to April 1, 1993, and a record time of 22:35:48. Ms. Biondo explained in her affidavit that the print date for certified mail records is approximately 10 days prior to the mail date, in order to give sufficient time to manually review the notices and to process the postage. She noted that personnel in the Division's mailroom changed the print date to conform to the actual date of delivery of the notices to the U.S. Postal Service. She also identified that the original document consisted of 18 fan-folded (connected) pages; that all pages are connected when the document is delivered into the possession of the U.S. Postal Service; and that the pages remain connected when the postmarked document is returned by the U.S. Postal Service after mailing unless she requests that the pages be disconnected.

Daniel B. LaFar is employed as a Principal Mail and Supply Clerk in the Division's mailroom. Mr. LaFar's duties include the supervision of mailroom staff in delivering outgoing Division mail to branch offices of the U.S. Postal Service. Mr. LaFar's affidavit sets forth the routine procedures governing outgoing mail which are followed by the mailroom in the regular course of business, and which allegedly were followed, in particular, on April 1, 1993.

Mr. LaFar identified that after a notice is placed in the "Outgoing Certified Mail" basket in the mailroom, a member of the staff weighs and seals each envelope; postage and fees are

affixed and the postage and fee amounts are recorded on the mail record. A mailroom clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record. A member of the mailroom staff delivers the stamped envelopes to the Roessleville Branch of the U.S. Postal Service in Albany, New York. The postal employee affixes a postmark and/or his or her signature to the certified mail record indicating receipt by the Postal Service. After the certified mail record has been signed and/or stamped by the U.S. Postal Service, it is returned the following day to the originating office within the Division (here CARTS).

The LaFar affidavit affirms that on April 1, 1993, an employee of the mailroom delivered a sealed post-paid envelope for delivery by certified mail addressed to International Installations, Inc., 200 Madison Avenue, New York, New York 10016-3903 to the Roessleville Branch of the U.S. Postal Service in Albany, New York.

The copy of the Notice of Deficiency submitted by the Division contains the following information: in the upper right hand corner is the certified control number "P 911 205 902"; the "Date" is listed as "04/01/93"; the "Assessment ID" listed is "L-007035132-5" and the "Total Amount Due" is listed as \$1,123.06. This Notice of Deficiency is addressed as follows:

"L-007035132-C002-7
International Installations, Inc.
200 Madison Ave.
New York, NY 10016-3903"

Directly beneath the address is the handwritten notation "Y/E 12/31/91 only". This Notice of Deficiency asserted corporation

franchise tax under Article 9-A and section 209(1) of the Tax Law.

The "Explanation and Instructions" section contained, in pertinent part, the following:

"An additional amount is due for the Tax Type indicated above. The original notice sent to you on 02/19/93 showed the detailed computation of the additional amount due. Please refer to the COMPUTATION SUMMARY SECTION for a computation of the current balance due. Recent adjustments, credits or payments may not be reflected in the current balance due."

The "COMPUTATION SUMMARY SECTION" contained the following:

"Tax Period Ended	Tax Amount <u>Assessed</u>	Interest Amount <u>Assessed</u>	Penalty Amount <u>Assessed</u>	Assessment Payments/ Credits	Current Balance Due
12-31-91	833.75	68.67	76.01	0.00	978.43
12-31-91	<u>123.25</u>	<u>10.15</u>	<u>11.23</u>	<u>0.00</u>	<u>144.63</u>
TOTALS	957.00	78.82	87.24	0.00	1,123.06"

On November 10, 1993, the Division of Tax Appeals issued to petitioner a Notice of Intent to Dismiss Petition pursuant to 20 NYCRR 3000.5(b)(5). After due consideration of the comments and documents submitted, the ALJ determined, on March 10, 1994, that the Division established that the Notice of Deficiency "at issue in this proceeding" was mailed to petitioner on April 1, 1993, and because the petition was not filed until August 31, 1993, the petition was not timely and dismissed it. The Administrative Law Judge also dismissed the petition with respect to notices of deficiency L-003302585-1, L-0033116270-6, L-003302587-8 and L-003302586-9 because petitioner failed to submit copies of these notices in response to the Division of Tax Appeals' letter dated September 7, 1993.

On exception, petitioner asserted that the dismissal with respect to all notices of deficiency other than L-007035132-5

should be without prejudice with leave to file additional petitions at a later date after notices of deficiency have been issued. Petitioner also asserted that the Notice of Deficiency dated April 1, 1993 was not properly mailed, pursuant to section 1091 of the Tax Law, because it was addressed to the wrong taxpayer. Petitioner claimed that if the notice had been properly addressed it would have been timely protested.

The Tax Appeals Tribunal remanded this matter to the Administrative Law Judge for a supplemental determination (citing Matter of United States Life Ins. Co. in the City of New York, Tax Appeals Tribunal, March 24, 1994) to address whether the notice was properly issued to petitioner and, if not, the effect of the error.⁴ The Tribunal also directed the Administrative Law Judge "to reconsider her decision with respect to the mailing of the notice 'at issue in this proceeding'." The Tribunal found that the mailing evidence in the record related only to a Notice of Deficiency L-007035132; while the Notice of Deficiency submitted by petitioner bore the numbers L-007035132-5 and L-007035132-C002-7. The Tribunal noted that the Administrative law Judge did not explain how she reached the conclusion that the mailing evidence related to the Notice of Deficiency submitted by petitioner. The Tribunal found that the record was devoid of any evidence to explain how the mailing evidence relates to this Notice of Deficiency. The

⁴The Tribunal noted that although the Administrative Law Judge acknowledged petitioner's argument that the Notice of Deficiency was defective because it was issued to the wrong corporation, the Administrative Law Judge did not address this issue.

Tribunal directed the Administrative Law Judge, in her supplemental determination to explain her conclusion. The Tribunal also found that the parties could submit evidence on this issue at the hearing to be scheduled. The Tribunal affirmed in part the Administrative Law Judge's determination to the extent that it dismissed the petition with respect to notices of deficiency L-003302585-1, L-003116270-6, L-003302587-8 and L-003302586-9 because petitioner failed to submit a copy of these notices as required by 20 NYCRR 3000.3(b)(8) for the purpose of determining the timeliness of the petition.

As part of its submissions, the Division included two tax returns, which had been filed by petitioner and had been received by the Division on March 15, 1992, the 1991 Form CT-183 Franchise Tax Return on Capital Stock by Transportation and Transmission Corporations ("1991 Form CT-183"), Tax Law - Article 9, Section 183 and the 1991 Form CT-183-M Metropolitan Transportation Business Tax Surcharge Return ("1991 Form CT-183-M"), Tax Law - Article 9, Section 183-a.

The information on the 1991 Form CT-183 was as follows: the Name and address box contained "International Installations, Inc., 200 Madison Ave., New York, N.Y. 10016"⁵; the "Tradename" box contained "Same"; the "Business telephone number" box contained "(212) 689-4400"; the "Business activity code number (from federal return)" box was blank. The "Principal business

⁵Petitioner's name and address were handwritten.

activity" box contained "Transportation Service"; New York was listed as the state of incorporation and the date of incorporation was January 28, 1964. The question, "Is the corporation organized under NYS Transportation Corporations Law?" was answered in the negative. The Federal return was filed on a "consolidated basis". The following two questions were answered in the negative:

- "Does this corporation have an interest in real property located in New York State?"
- "Has the controlling interest in the corporation's stock changed during the period covered in this return?"

An affirmative response was given to the question, "Do you do business, employ capital, own or lease property or maintain an office in the Metropolitan Commuter Transportation District?". The total tax and tax

surcharge was reported as \$86.25, which also was the amount reported as enclosed.

The 1991 Form CT-183-M contained the same information for "name and address"; "Trade name"; "State of incorporation and date"; and "Business telephone number" as was listed on the 1991 Form CT-183 which was discussed above. The "MTB Tax surcharge" was reported as \$12.75, which was the amount reported as enclosed.

The Division submitted a Statement of Proposed Audit Changes, ("statement") which it had issued to petitioner. This statement was dated February 19, 1993 and asserted Corporation Franchise Tax pursuant to Article 9-A and section 209.1 of the

Tax Law. The "Computation Section" of the statement contained the following:

"This notice of estimated additional tax is being issued because we did not receive the reports requested in our correspondence dated 12/14/92.

"If you have any questions about this notice, you may call LINDA MARTINEZ at (518) 457-3324. Please have the assessment number available when calling.

"TAX PERIOD ENDED DATE: 12/31/91

REPORT FILED: CT-3

FILE DUE DATE: 03/15/92

DATE RECEIVED: 03/15/92

Tax Per Taxpayer: 86.25

Tax Per Dept of Tax & Finance:

920.00

Timely Payments/Credits:

86.25

Late Payments:

0.00

Amount Previously Assessed/Refunded:

0.00

BALANCE: 833.75

Tax Amount Assessed:

833.75

Interest Amount Assessed:

61.60

Penalty Amount Assessed:

72.48

Assessment Payments/Credits:

0.00

Current Balance Due:

967.83

"TAX PERIOD ENDED DATE: 12/31/91
REPORT FILED: CT-3M/4M FILE DUE DATE: 03/15/92
DATE RECEIVED: 03/15/92

136.00
12.75
0.00
0.00
123.25
9.11
10.71
0.00
143.07"

Tax Per Taxpayer: 12.75
Tax Per Dept of Tax & Finance:
Timely Payments/Credits:
Late Payments:
Amount Previously Assessed/Refunded:
BALANCE: 123.25
Tax Amount Assessed:
Interest Amount Assessed:
Penalty Amount Assessed:
Assessment Payments/Credits:
Current Balance Due:

The "Computation Summary Section" contained the following:

"Tax Period Ended	Tax Amount <u>Assessed</u>	Interest Amount <u>Assessed</u>	Penalty Amount <u>Assessed</u>	Assessment Payments/ Credits	Current Balance Due
12-31-91	833.75	61.60	72.48	0.00	967.83
12-31-91	<u>123.25</u>	<u>9.11</u>	<u>10.71</u>	<u>0.00</u>	<u>143.07</u>
TOTALS	957.00	70.71	83.19	0.00	

1,110.90"

The Division also submitted the affidavit of Carl Moeske with a copy the Notice of Deficiency (Notice No. L-007035132-5) dated April 1, 1993 attached as Exhibit "A". Carl Moeske is an Associate Computer Programmer Analyst in the Information Systems Management Bureau of the Division.

In his affidavit, Mr. Moeske stated that he oversees the daily computer operations of the Division's computer system which stores information and generates printed documents including notices of deficiency and notices of determination. He further states:

- "3. The New York State Department of Taxation and Finance's Billing Program, which controls the creation of Notices of Deficiency and Notices of Determination, uses a "check digit" mechanism to verify various numbers used to identify cases and taxpayers, including assessment numbers. The use of a check digit ensures that identifying numbers have been correctly entered into the New York State Department of Taxation and Finance's (hereinafter the Department) computer system.
- "4. A check digit is generated by a mathematical calculation using an identification number which is composed of up to sixteen digits. In the case of Notices of Deficiency and Notices of Determination the identification number is the assessment number. The first time an identification number is used in the data processing system, the check digit is calculated and appended to the identification number.
- "5. The calculation to determine the check digit for an assessment is a five step process. The first step is to scan the assessment number for letters and replace any letters found with their numerical equivalents from the numbers ten through thirty-five. For example, the letter A is replaced with the number ten, the letter L is replaced with the number twenty-one and the letter Z is replaced with the number thirty-five. In step two each number is multiplied by the value of its position within the assessment number. Next, in step three, the values calculated in step two are added together and in step four this sum is divided by the number nine into a quotient and a remainder. In step five the remainder from step four is subtracted from the number nine thus resulting in the check digit.
- "6. I have examined the document attached hereto as Exhibit 'A'. The following is the five step calculation for Not. No. L007035132 that resulted in a check digit of '5'.

Step 1: Convert the assessment number to numerics:
before- L 0 0 7 0 3 5 1 3 2
after - 21 0 0 7 0 3 5 1 3 2

Step 2: Multiply digits by positional values:
digits- 21 0 0 7 0 3 5 1 3 2
pos. - 1 2 3 4 5 6 7 8 9 10
values -- -- -- -- -- -- -- -- -- --
21 0 0 28 0 18 35 8 27 20

Step 3: Sum the results from Step 2:

$$21+0+0+28+0+18+35+8+27+20=157$$

Step 4: Divide the total sum from Step 3 by nine:
 $157/9=17$ remainder 4

Step 5: Subtract the remainder from nine thus giving the check digit:
 $9-4=5$

Therefore, assessment number L007035132 is the same assessment number as L-007035132-5, but without the check digit.

- "7. Additional letters/digits are added to the assessment number at various stages in the processing of a case. For example, case contacts are prefixed by the letter 'C' and shown as part of the assessment number on printed copies of documents. The letter 'C' followed by a number or numbers is an internal device used by the Department to indicate what number contact is being made with the taxpayer. Because a case contact adds digits to the overall number, a new check digit is calculated each time a new contact is made which results in the creation of a unique fourteen digit number. However, within each newly created fourteen digit number is the original nine digit assessment number.
- "8. I have reviewed Exhibit 'A' including the references to 'Assessment ID: L-007035132-5' and L-007035132-C002-7. The notation L-007035132-C002-7 is the same assessment as L-007035132-5 except L-007035132-C002-7 contains an additional internal code. The addition of 'C002' to the assessment number indicates that this assessment was the second contact with the taxpayer concerning the matter at issue in the Notice of Deficiency. The addition of 'C002' also resulted in a new check digit.
- "9. The following is the five step calculation for L-007035132-C002 that resulted in a check digit of '7'.

Step 1: Convert the assessment number to numerics:

before-	L	0	0	7	0	3	5	1	3	2	C	0	0	2
after -	21	0	0	7	0	3	5	1	3	2	12	0	0	2

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Step 2: Multiply digits by positional values:
digits- 21 0 0 7 0 3 5 1 3 2 12
0 0 2
pos. 1 2 3 4 5 6 7 8 9 10 11
12 13 14

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values-	--	--	--	--	--	--	--	--	--	--	--	--
--	--	--										
		21	0	0	28	0	18	35	8	27	20	132
0	0	28										

Step 3: Sum the results from Step 2:
 $21+0+0+28+0+18+35+8+27+20+132+0+0+28=317$

Step 4: Divide the total sum from Step 3 by nine:
 $317/9=35$ remainder 2

Step 5: Subtract the remainder from nine thus
giving the check digit:
 $9-2=7$

Mr. Moeske affirms that all references to L-007035132, L-007035132-5 and L-007035132-C002-7 are references to the same Notice of Deficiency.

In its submissions, the petitioner included the affirmation of its representative, Alexander J.D. Greeley, Esq.,⁶ the affidavit of Thomas J. Del Mastro, a copy of an Amended Petition for International Installations, Inc.,⁷ a copy of the Division's August 20, 1993 letter addressed to petitioner, a copy of the 1991 Form 1120, U.S. Corporation Income Tax Return, for "McNally International Corp. and Subsidiary", a copy of a letter dated March 16, 1993 from Frank R. McNally, President, to the Division and a copy of a 1991 Form 1120, U.S. Corporation Income Tax Return "Amended

⁶This affirmation is undated; however the coverletter which accompanied it is dated October 15, 1994. This affirmation and the attachments were received by the Division of Tax Appeals on October 24, 1994.

⁷It appears this Amended Petition may have been received by the Division of Tax Appeals on November 26, 1993; a photocopy of a PS Form 3811 Return Receipt card, which was signed by a Division employee on November 26, 1993 is superimposed on the front page of the Amended Petition. However, the petition was not associated with the petition assigned DTA No. 812307 and which is the subject of the instant matter.

Shell Return" for "International Installations Inc."

Mr. Greeley in his affirmation states, in pertinent part, the following:

"(2) That the Petition filed on September 2, 1993 was amended on November 26, 1993 which contained new paragraph 5, 6, 7, 8, 9, 10, and 11. The Petitioner had an absolute right to amend this Petition under Section 3000.4 (c) 'Either party may amend a pleading once without leave within 20 days after its service or at any time before the period for responding to it expires or within 20 days after service of a pleading responding to it.' Since the answer still has not been served the amendment is in order and the new paragraphs 5 thru 11 in effect states that the only year in issue is 1991 since no other notices of deficiency was mailed. They further state that the Petitioner is not the taxpayer and therefore the Notice of Deficiency is defective. To dismiss the Petition under Section 1089 (b) this issue must be addressed and satisfied. A copy of this amended Petition identifies the Petitioner as 'International Installations, Inc.' only.

"(4) Tax Law Sec. 1081 (a) in, pertinent part, provides that a Notice of Deficiency of corporation tax 'shall be mailed by certified or registered mail to the taxpayer at its last know [sic] address in or out of this state' but the Petitioner (International Installation, Inc.) is not the taxpayer. The Notice of Deficiency is 'per se' defective because it is not addressed to the taxpayer.

"(5) Attached hereto and made a part hereof is the affidavit of Thomas Del Mastro, C.P.A., of the accounting firm which prepared the tax return 1120 which included the Subsidiary (Petitioner herein) and even explained the confusion of Audit Division's letter dated August 20, 1993 as being false and misleading. The Court refers to this letter in its Decision of September 15,

1994 on pages 3 and 4. Based on these facts and not the letter dated August 20, 1993, it can only be concluded that the Notice of Deficiency was not mailed to the taxpayer under Section 1081 (a) of the tax law.

- "(6) In addition to the other defects outlined in the Decision of Tax Appeals Tribunal dated September 15, 1994 the motion should be dismissed with respect to the assessment for 1991.
- "(7) A strict interpretation of Section 1081 (a) in the Tax Law is necessary to be constitutional. Justice Holmes in his famous decision wherein the Federal Government was denied the right to tax interest income from State Obligations said 'The power to tax is the power to destroy'. The State of New York could destroy every subsidiary in the State of New York if this motion is not dismissed.
- "(8) New York Tax Law Art 9 (a) Section 97-961 states:
'14. A "corporate consolidation" means a procedure comprised of the consolidation of two or more corporations into a single corporation which is a new corporation to be formed pursuant to the consolidation under Article nine of the business corporation law'. Ch. 60 Art 9 A Section 208 (14) New York Tax Reports reported by CCH The Tax Law of the State of New York as Section 97-961.
- "(9) Based on this definition there is only one taxpayer, McNally International, Corp. and the Notice of Deficiency fails because it is addressed to International Installations, Inc."

Thomas J. Del Mastro is the president of Del Mastro & Company C.P.A., P.C., the accounting firm which prepared the 1991 Form 1120 for McNally International Corp. and Subsidiary. In his affidavit, Mr. Del Mastro states that the letter dated August 20, 1993 from the Division to petitioner is false and misleading. He avers that the facts are as follows:

"(A) On or about due date March 15, 1992, this office prepared Form CT184 for the calendar year 1991 and filed same with a copy of Federal Return Form 1120 for which clearly states on page one NAME: 'McNally International Corp. & Subsidiary'. In addition, the Federal Return (1120) contained the necessary Form 851 'Affiliations Schedule - File with each consolidated income tax returns' . . . and clearly states that Part I. Subsidiary corporations 'International Installations EID #11-2040702 with schedule of address etc.

"(B) On or about March 16, 1993 (one year after filing original return) this office prepared a 'Shell Return Form 1120 for susidary [sic] only which we turned over to the Petitioner for a reply to the audit division; central office Corp. Tax AG2. (copy of letter March 16, 1993 from Petitioner to Linda Martinez is attached (as copy C) and included Federal Return 1120 for International Installations Inc. only and marked on top 'Shell Return'. The purpose of this return (mailed to the auditor only) was to assist in her understanding of the letter of the Petitioner dated March 16, 1993 explaining why her proposed assessments were in error."

He explained that a "Shell Return" is a proforma return used to show what the figures would have been if said return was filed. Mr. Del Mastro affirmed that the original return of McNally International Corp. (parent) filed on or about March 15, 1992 included the figures of petitioner (subsidiary) on Form CT 184. Furthermore, he stated that, to date, he is not aware of any credits to these figures being issued by the Division to McNally International Corp. (parent corporation) for the years 1987, 1988, 1989, 1990 and 1991 because of this audit. He further averred that the Audit Division's statement in its August 20, 1993 letter, i.e., "The original 1120 filed with the federal government attached to the CT 183 did not indicate consolidated", is incorrect. He stated that:

"Form CT 183 is a tax on Capital Stock and requires no Federal Return. We would have attached this form to CT 184 thereby making it part of the return."

Mr. Del Mastro affirmed that the taxpayer as defined by New York State Tax Law is McNally International Corp. and any Notice of Deficiency should have been mailed to it.

One of the attachments to Mr. Greeley's affirmation is a copy of an Amended Petition which he asserts was submitted to the Division of Tax Appeals on or about November 26, 1993. A review of this amended petition discloses the following information:

(a) Petitioner is identified as "International Instalations [sic] Inc.";

(b) Petitioner states (by checking appropriate boxes on the petition form) that it is petitioning for redetermination of a deficiency of corporation franchise tax under Article 9-A of the Tax Law. The years listed are 1988, 1989, 1990 and 1991;

(c) The Taxpayer Identification Number is listed as: 11-2040702-2;

(d) The notice/assessment numbers are the same as those listed on the original petition (see, Finding of Fact "3"); and

(e) The amount stated in the amended petition was the same as that stated on the original petition (see, Finding of Fact "3").

The first four assertions in the amended petition are the same as those in the original petition (see, Finding of Fact "4"). Petitioner in its amended petition, also stated that the Notice of Deficiency was addressed to the wrong taxpayer. It

also asserted that the Notice of Deficiency for the year 1991 is patently defective because it was addressed to the wrong taxpayer (i.e., International Installations Inc. instead of McNally Installations Corp.). Additionally, it asserted that (a) since the tax returns of McNally International Corp. included all income (including that of itself), the Commissioner is estopped from taxing petitioner twice, once under Article 9 section 184 of the Tax Law and again under Article 9-A section 209(1) because Article 9-A does not apply; (b) a petition for the years from 1987 through 1990 has already been filed for taxes under Article 9 section 184 for McNally International Corp. (parent corporation) and has been assigned DTA No. 810770; (c) "the assessments should be dismissed because there is an action pending between the same parties and payment of taxes was made with the consolidated return"; and (d) the assessments for the years 1988, 1989 and 1990 should be dismissed since no notices of deficiency for these years were ever filed. Furthermore, the petitioner states that the correct procedure of the Division should have been:

(1) To conduct an audit of McNally International Corp. for tax year 1991;

(2) To reduce the income of McNally International Corp. by the amount of income included which belonged to International Installations, Inc.; and

(3) To mail the Notice of Deficiency to McNally International Corp.

One of the attachments to the Del Mastro affidavit is a

copy of the 1991 Form 1120 U.S. Corporation Income Tax Return ("Form 1120") for "McNally International Corp. & Subsidiary". The box next to "Consolidated Return" was checked in the upper left hand corner of the Form 1120. Attached to this return was Form 851 Affiliations Schedule which was required if a consolidated return was being filed. On this form, the subsidiary corporation is listed as "INT'L INSTALL", Employer identification number "11-2040702".

Included as attachments to Mr. Del Mastro's affidavit were a letter from Frank R. McNally, President, to Linda Martinez of the Audit Division dated March 16, 1993 and a copy of the 1991 Form 1120 "Amended Shell Return" U.S. Corporation Income Tax Return for International Installations Inc.

The letterhead on the McNally letter contains petitioner's name and address. This letter references: "Taxpayer ID B-11-2040702-2"; "Assess. No. L-007035132-5"; "Notice Dated: 2/19/93". Mr. McNally wrote in pertinent part:

"With regard to your 'Statement of Proposed Audit Changes referred to above, which we disagree for the following reasons;

"The corporation is a member of a controlled group and its revenue and expenses have been included in the consolidated results of its' [sic] parent company.

"The revenues have been billed in the name of International Installations, Inc. and the expenses which consist of payroll and related taxes and expenses, have been paid through its' [sic] parent company, pursuant to Section 3121(a) of the Internal Revenue Code (common paymaster).

"For your convenience, we have prepared an amended shell return of 'U.S. Corporation Income Tax Return' Form 1120 for 1991 for International Installations, Inc.

"Based upon the above facts, we believe that the original return should not be adjusted."

This letter was sent registered mail to the Division.

The copy of petitioner's Form 1120 "Amended Shell Return" submitted consists of the first page of the return. Review of this form reveals that petitioner's gross receipts or sales were \$9,184.00; "other deductions" were reported as "7,347.00 and "taxable income" was reported as \$1,837.00. There were references to "Statement 2" and "Statement 3" on this form; however they were not included.

SUMMARY OF THE PARTIES' POSITIONS

The Division contends that the Notice of Deficiency was issued to the correct taxpayer International Installations, Inc. It asserts that:

"[t]he Statement of Proposed Audit Changes issued in this matter, which explains the calculation of the tax assessed in the corresponding Notice of Deficiency, specifically refers to the amounts of tax reported by International Installations, Inc. on their 1991 CT-183-M return and their 1991 CT-183 return. The Statement of Proposed Audit Changes and the Notice of Deficiency were both sent to International Installations, Inc., which is the corporation listed on the assessed returns."

The Division also contends that it has established that the Notice of Deficiency was issued to petitioner on April 1, 1993. It avers that the affidavit of Carl Moeske explains in great detail that "L-007035132-5" and L-007035132-C002-7" are just variations, "due to attached check digits," of Notice number "L007035132" and that all three numbers refer to the same Notice of Deficiency. The Division argues that the evidence it submitted, the affidavits of Ms. Biondo and Messrs. Moeske and

LaFar and the CMR, clearly prove that Notice of Deficiency L007035132 was issued to petitioner on April 1, 1993.

The Division requests that the petition be denied and the Notice of Deficiency be sustained.

Petitioner contends that the Notice of Deficiency was issued to the wrong taxpayer. It asserts that the correct taxpayer is McNally International Corp. and subsidiary. Petitioner argues that its income was reported as part of the gross income on McNally International Corp. Forms CT-184 and CT-184M for 1991, with the annexed 1991 Form 1120 and the accompanying Schedule 851. It asserts that the total amount of the tax was paid by the parent corporation, McNally International Corp. on behalf of its subsidiary, petitioner; petitioner did not pay any taxes; and the tax return was signed by the officers of McNally International Corp.

Petitioner avers that it is not subject to tax under Article 9-A of the Tax Law because it is a transportation company which is subject to tax under Article 9 of the Tax Law. Furthermore, since it is a transportation company, Tax Law section 184 applies and Form CT-184 would be the appropriate form not Form CT-3 referred to in the Division's Statement of Proposed Audit Changes.

Petitioner also contends that the Division has failed to prove that the Notice of Deficiency was issued to petitioner on April 1, 1993. It argues that Mr. Moeske's affidavit states "nothing except that the software is cross indexed to provide internal administration information" (Petitioner's Brief

[Supplemental], p. 2). In addition, it argues that the Biondo and LaFar affidavits state only that a mailing occurred on April 1, 1993. Petitioner contends that neither the Biondo affidavit nor the LaFar affidavit "state that they knew that the Notice of Deficiency was the paper in the envelope" (Petitioner's letter in lieu of a reply brief, p.3). It avers that the Division has not submitted its own copy of the Notice of Deficiency allegedly issued on April 1, 1993, nor has it submitted an affidavit from the employee who placed the Notice of Deficiency in the envelope. Therefore, petitioner argues that the Division has failed to complete its burden of proof.

Petitioner requests that the motion be dismissed and the petition be deemed timely.

CONCLUSIONS OF LAW

A. The Tax Appeals Tribunal remanded this case on the issues of whether the notice was properly issued to petitioner and, if not, the effect of the error and whether petitioner timely filed a petition with the Division of Tax Appeals.

B. Tax Law § 209(1) provides, in pertinent part, that:

"For the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, for all or any part of each of its fiscal or calendar years, every domestic or foreign corporation, except corporations specified in subdivision four of this section, shall annually pay a franchise tax"

Tax Law § 209(4) provides, in pertinent part, that:

"Corporations liable to tax under sections one hundred eighty-three to one hundred eighty-six, inclusive . . . shall not be subject to tax under this article."

C. Sections 183 and 183-a impose an annual franchise tax on transportation and transmission companies for the privilege of exercising a corporate franchise, or of doing business, or of employing capital, or of owning or leasing property, or of maintaining an office in this State, based upon capital stock in the state during the proceeding year.

D. Sections 184 and 184-a of the Tax Law impose additional franchise taxes on every corporation engaged in the conduct of a trucking business, and every other corporation principally engaged in the conduct of a transportation business for the privilege of exercising a corporate franchise, or of doing business, or of employing capital, or of owning or leasing property, or of maintaining an office in this State, based upon gross earnings during such year.

E. Tax Law § 1081(a) provides, in pertinent part that:

"General.--If upon examination of a taxpayer's return under article nine, nine-a, nine-b or nine-c, the tax commission determines that there is a deficiency of tax, it may mail a notice of deficiency to the taxpayer. If a taxpayer fails to file a tax return required under article nine, nine-a, nine-b or nine-c, the tax commission is authorized to estimate the taxpayer's New York tax liability from any information in its possession, and to mail a notice of deficiency to the taxpayer. A notice of deficiency shall be mailed by certified or registered mail to the taxpayer at its last known address in or out of this state"

F. Tax Law § 1089(e) provides that the burden of proof is on the petitioner.

G. Petitioner asserts that the Division issued the Notice of Deficiency to the incorrect taxpayer. It argues that the correct taxpayer is McNally International Corp. and subsidiary.

Petitioner asserts that it is a wholly-owned subsidiary of McNally International Corp. whose income was included in the income which McNally International Corp. reported on its 1991 Forms CT-184 and CT-184M filed with the Division. Petitioner avers that it correctly filed the Forms CT-183 and CT-183M, on its own behalf, for the year in question. It asserts that it is a transportation company and as such is not subject to tax under Article 9-A of the Tax Law. Furthermore, petitioner argues that the Division is unconstitutionally subjecting it to tax twice - once under Tax Law § 184 and again under Tax Law § 209(1).

Petitioner's arguments are without merit. I find that the Division issued the Notice of Deficiency to the correct taxpayer, petitioner. As noted in Conclusion of Law "B", Tax Law, Article 9-A, § 209(1) imposes corporation franchise tax on all domestic corporations except transportation and transmission companies which are subject to corporate franchise tax pursuant to Tax Law, Article 9, §§ 183 and 184. A corporation is to be taxed according to the business it conducts rather than the law under which it is organized (see, Newton Creek Towing Co. v. Law, 205 App Div 209, 199 NYS 866, affd 237 NYS 78, 143 NE 749). Petitioner has failed to prove that it is a transportation company which is subject to tax under Article 9 of the Tax Law. Other than its representative's assertion that petitioner is a transportation company, which is a wholly-owned subsidiary of McNally International Corp., the record is silent as to the exact nature of its business. Because petitioner has failed to carry its burden of showing the exact nature of its activities

and that it is a transportation company, it was properly taxed by the Division under Tax Law, Article 9-A, § 209(1) (see, Conclusion of Law "F").

Petitioner's argument that it is being unconstitutionally taxed twice is without merit. Petitioner filed and paid corporate franchise taxes pursuant to Tax Law §§ 183 and 183-a only. It did not pay any additional franchise tax pursuant to Tax Law §§ 184 and 184-a. Petitioner has contended that its parent, McNally International Corp. paid the additional franchise taxes due under Tax Law §§ 184 and 184-a on its behalf by including petitioner's income in the parent's income reported pursuant to Tax Law §§ 184 and 184-a. Combined filing is not allowed under Article 9 of the Tax Law (Tax Law § 211[4]; 20 NYCRR 6-2.5[c]). It is noted that the Division, when it calculated the tax due under Tax Law § 209(1), gave petitioner credit for the payments which had been made when the petitioner had filed the 1991 Forms CT-183 and CT-183M (see, Findings of Fact "15", "19", and "20").

The Division issued the Notice of Deficiency to the correct taxpayer, petitioner, International Installations, Inc.

H. Tax Law § 1081(b) provides as follows:

"After ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the tax commission a petition under section one thousand eighty-nine."

I. Tax Law § 1089(b), in pertinent part, provides that:

"[W]ithin ninety days . . . after the mailing of the

notice of deficiency authorized by section one thousand eighty-one, the taxpayer may file a petition with the tax commission for a redetermination of the deficiency."

J. The Rules of Practice and Procedure of the Tax Appeals Tribunal provide that:

"The petition must be filed within the time limitations prescribed by the applicable statutory sections, and there can be no extensions of those time limitations . . ." (20 NYCRR 3000.3[c]).

K. If a taxpayer fails to file a petition protesting the notice of deficiency, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (see, Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

L. Where the timeliness of a protest is at issue, the Division bears the burden of proof to demonstrate the proper mailing of the documents protested (in this case, the Notice of Deficiency) which begins the running of the 90-day statutory period (see, Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992; Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991; see also, Cataldo v. Commissioner, 60 TC 522, affd 499 F2d 550, 74-2 US Tax Cas ¶ 9533). The Division may prove such mailing by offering evidence as to its standard mailing procedures, corroborated by direct testimony or documentary evidence of mailing of the particular document in question (see, Matter of Montesanto, Tax Appeals Tribunal, March 31, 1994; Matter of Accardo, Tax Appeals Tribunal, August 12, 1993; Matter of Air

Flex Custom Furniture, supra; Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., supra; see also, Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111; Cataldo v. Commissioner, supra).

M. As noted in Conclusion of Law "L", the required proof of mailing is two-fold: first, there must be proof of the Division's standard procedure for issuance of notices, provided by individuals with knowledge of the relevant procedures; and second, proof that the standard procedure was followed in the particular instance in question. The Division submitted the affidavits of Ms. Biondo and Messrs. Moeske and LaFar in support of its position that the Notice of Deficiency was issued to petitioner on April 1, 1993.

The evidence submitted by the Division establishes that the Notice of Deficiency at issue in this proceeding was mailed to petitioner on April 1, 1993. Mr. Moeske's affidavit explains the Division's general procedures in the generation of notices of deficiency and notices of determination, as well as the internal control devices used by the computer in the generation of the various notices by their respective assessment numbers. His affidavit further explained why various numbers, i.e., L-007035132, L-007035132-5 and L-007035132-C002-7 all reference the same Notice of Deficiency, and identify it as the assessment issued to petitioner. Mr. Moeske's affidavit establishes that the computer generates a unique assessment number for each taxpayer and updates its internal system through the use of the "identity check".

Ms. Biondo's affidavit explains that the notices of deficiency generated by the computer are predated with the anticipated date of mailing and each notice is assigned a "certified control number". The computer lists the certified control numbers under the heading "CERTIFIED NO." on the computer printout (the certified mailing record). Review of the Notice of Deficiency at issue in the instant matter and the certified mailing record reveal that both have the same certified control number, to wit: P 911 205 902 for petitioner (see, Findings of Fact "12" and "15"). The Division has established through the affidavits of Ms. Biondo and Messrs. Moeske and LaFar that the Notice of Deficiency was issued and sent by certified mail on April 1, 1993 to petitioner. In addition, the Division has submitted a copy of the 18-page Assessments Receivable certified mail record for April 1, 1993 as proof of mailing.

I find the certified mail record in this case to be adequate. The certified mail record submitted contains all 18 pages of the original 18-page fan-folded certified mail record. All 18 pages of the certified mail record are date stamped April 1, 1993 by the Roessleville branch of the United States Postal Service. The postal representative's signature appears under the circled number 191 on page 18 of the certified mail record. This supports the conclusion that all 191 pieces were in fact received at the post office (see, Matter of Katz, supra).

The Division has established April 1, 1993 as the date of

mailing of the Notice of Deficiency.

N. Tax Law § 1081(a) requires the Division to send notice by certified or registered mail when it determines that there is a corporation franchise tax deficiency. The statute does not require actual receipt by the taxpayer; the notice sent by certified or registered mail to the taxpayer's last known address is valid and sufficient whether or not actually received (see, Matter of Malpica, Tax Appeals Tribunal, July 19, 1990; Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 667, 335 NYS2d 1028; cf., Matter of Ruggerite, Inc. v. State Tax Commn., 97 AD2d 634, 468 NYS2d 945, affd 64 NY2d 688, 485 NYS2d 517). If the notice is properly mailed, the statute places the risk of nondelivery on the taxpayer (see, Matter of Malpica, supra). Once the statutory notice is mailed, the taxpayer has 90 days within which to petition for a redetermination (see, Conclusion of Law "H").

O. As noted in Conclusion of Law "H", a Notice of Deficiency becomes an assessment unless the taxpayer files a petition with the Division of Tax Appeals within 90 days after the notice is issued. The last day on which petitioner could have timely filed the petition was June 30, 1993. The petition was filed with the Division of Tax Appeals on August 31, 1993. Unfortunately, this date is well past the statutory 90-day period within which a petition may be filed. Accordingly, the petition was not timely filed and the Division of Tax Appeals is without jurisdiction to entertain the merits of petitioner's

case.

P. Finally, it is noted that petitioner is not without recourse here, for it may pay the disputed tax and, within two years from the date of payment, apply for a refund (Tax Law § 1087[a]). If its request for a refund is denied, petitioner may then proceed with another petition requesting a hearing or a conciliation conference (Tax law § 170[3-a][a]; cf., Matter of Rosen, Tax Appeals Tribunal, July 19, 1990).

Q. It is ordered that the petition of International Installations, Inc. be, and the same is hereby dismissed.

DATED: Troy, New York
September 7, 1995

/s/ Winifred M. Maloney

ADMINISTRATIVE LAW JUDGE